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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,971	07/15/2003	Nadeen B. Myers	41482-41410	7833
21888	7590	05/13/2005	EXAMINER	
THOMPSON COBURN, LLP ONE US BANK PLAZA SUITE 3500 ST LOUIS, MO 63101			PRATT, HELEN F	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 05/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/619,971

Applicant(s)

MYERS, NADEEN B.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-39 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-39 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1- 14, 16, 17, 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Valencia et al. (6,833,146) in view of Kalala et al. (4,871,554) and Reussner (3,968,263).

Valencia et al disclose the use of tricalcium phosphate (TCP) in a dry beverage mix with citric acid and a transparent ingestive liquid (water) (abstract and col. 10, lines 17-70, col. 5, lines 50-70 and col. 6, lines 45-65). Claims 1-4 and 16 differ from the reference in the use of 10-50% of the RDA for calcium per serving. However, the reference discloses the use of calcium hydroxide in amounts of 3% (almost a 1-4 ratio of calcium hydroxide to citric acid) (col. 10, lines 50-65). Kalala et al. '554 disclose the use of TCP in amounts between 10-100% of the RDA (abstract and col. 11, lines 16-25). The composition of Valencia is considered to be fluid because the dry mix has been mixed with water. Reussner discloses the use of from 1-2.5 grams of TCP/qt in a high acid beverage (col. 2, lines 1-12). Therefore, it would have been obvious to substitute the amounts of TCP of '554 in the composition of Valencia for its known function of being a soluble calcium supplement which is free of harsh and bitterness,

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calcium precipitation and the amounts of Reussner in the composition in order to increase the amount of calcium to nutritional levels.

Claim 5 further requires that the liquid is shelf- stable. However, nothing new is seen in the use of shelf stable beverages, which are commonly seen as bottled beverages. Therefore, as the technology is well settled as to how to make a shelf stable beverage and the claim only requires that the product is shelf stable, it would have been obvious to make the instant product shelf stable in order to market it over a period of time.

Claims 6-9 further require that the composition is stored at various temperatures. However, it would have been obvious to store at temperatures, which would have kept the ingredients in solution in order for the beverage to be transparent.

Nothing new is seen in the use of carbonation, as in claim 10, or flavoring as in claim 11, or in coloring as in claim 12 or the particular name of the beverage as in claim 13 because it is well known to carbonate, flavor and color a beverage. The composition has been shown as in claim 4 and therefore could be a sports drink or a juice.

The limitations of claims 17 and 18 have been disclosed above and are obvious for those reasons. The TCP is seen to stay in solution since the composition has been shown.

Claims 14-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1-13, 16-18 above, and further in view of Anderson (EP 0225 684 B1) and Anderson (4,851,243).

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Anderson discloses the use of fine particles of TCP which can be as small as 75 microns (page 6, lines 24-39). No patentable distinction is seen between 44 microns to 8 microns as in claims 14 and 15 absent a showing of unexpected results because the TCP is also disclosed to dissolve quickly at 75 microns in size. Anderson '243 discloses that it is known to use TCP in a particle size of about 44 microns in a beverage (col. 5, lines 50-70). Therefore, it would have been obvious to use a particle size within the claimed size as in claims 14 and 15 in the process of the combined references.

Claims 19-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references including both rejections as applied to claims 1-18 above, and further in view of Palaniappian US 2002/0122866 A1).

The claimed composition has been shown above. Palaniappian discloses that it is conventional to fortify beverages with calcium using a two- step process as in claim 19 (0006). Claim 19 further requires that the fluid composition have from 10-50% of the RDA of calcium per serving. Calcium levels of 10% and higher are disclosed by Palaniappian (page 2, 0026). No specific calcium compound is required in Palaniappian in claim 1. The specification does cite a number of types of calcium, but they are only "for example" (0025). Therefore, it would have been obvious to use the method of Palaniappian of making a calcium- fortified beverage using the TCP of the combined references.

The further limitations of claims 20-34 have been disclosed above and are obvious for those reasons.

Claim 35 is also a product by process claim. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See *In re Thorpe* 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See *Ex parte Jungfer* 18 USPQ 2D 1796. The composition has been shown above and is obvious for those reasons.

Claim 36 further requires combining TCP in citric acid solution with another fluid at a pH from 2 to 3.5. Palaniappian discloses a process of combining a calcium base and acid to make an acid/base solution and adding it to a beverage (0027 and 0028). The preferred pH is from 3.5 to 5.3 (0032). Claim 36 differs from the reference in the use of TCP. However, claim 1, of the reference to Palaniappian only requires a calcium-containing base and the particular calcium used as in paragraph 0025 are not limited by the ones cited by the phrase "for example". In addition, Kalala et al. disclose the use of TCP in a beverage in nutritional amounts. Therefore, it would have been obvious to add a calcium base to an acid as disclosed by Palaniappian at a pH of 3.5.

Valencia et al. disclose a dry composition as in claim 37. Claim 37 differs in the particular amounts of calcium which have been disclosed above. The other limitations have been disclosed above as in claims 38 and 39. Therefore, it would have been obvious to make a dry composition with amounts of calcium with the RDA as disclosed by the above combined references.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 5-4-05.


HELEN PRATT
PRIMARY EXAMINER